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SUMMARY RECORD OF THE 18th MEETING

Chairman:	Mr. MADEJ (Vice-Chairman)	(Poland)
later:	Mr. LAMPTEY (Chairman)	(Ghana)

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In the absence of Mr. Lamptey (Ghana), Mr. Madej (Poland), Vice-Chairman, took the Chair.

The meeting was called to order at 10.20 a.m.

AGENDA ITEM 137: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION (continued) (A/49/10 and A/49/355)

1. Mr. BOS (Netherlands) said that the establishment of the International Tribunal on the former Yugoslavia and the proposal to establish one on Rwanda showed that the international community needed a permanent international criminal court. The International Law Commission was to be congratulated on the valuable work it had accomplished during its forty-sixth session on the draft statute for an international criminal court. While the draft submitted by the Commission was acceptable on the whole, he wished to draw attention to a number of points that he viewed as important.

2. The only sound legal basis for the establishment of the court was a multilateral treaty, since that was the only way in which States could decide freely whether they accepted the statute and the jurisdiction of the court. Among the procedures proposed, amendment of the Charter of the United Nations posed serious practical problems, General Assembly resolutions had the status of recommendations and were not binding, and Security Council resolutions could be binding if adopted under Chapter VII of the Charter which, as was well known, related to the maintenance and restoration of peace. Clearly, once the court was established, it should have a close relationship with the United Nations. On that point, the provisions of article 2 of the draft statute seemed to be acceptable.

3. With regard to the composition of the court, articles 4 and 6 struck a balance between the need for flexibility - the court would meet only to consider a case - and the need for continuity - the judges would be elected for a fixed term. However, the distinction between judges with criminal law experience and judges with recognized competence in international law was too rigid and categorical and could raise practical problems when an appeals chamber and one or more trial chambers were being constituted. Article 6, paragraph 6, which fixed the term of office of judges at nine years, as in the case of Judges of the International Court of Justice, should not be changed.

4. The court's jurisdiction should be confined to a very limited number of extremely serious crimes, since States would be willing only in exceptional cases to waive their sovereignty in the field of criminal law in favour of an international mechanism. Three criteria would have to be met for offences to fall within the court's jurisdiction ratione materiae: first, the offences would have to constitute a violation of fundamental humanitarian principles and outrage the conscience of mankind; secondly, they would have to be such that their prosecution would be more appropriate at the international than at the national level; and thirdly, it would have to be possible to hold one or more individuals personally responsible for the offences. Genocide, aggression,

serious war crimes and systematic and large-scale violations of human rights would therefore come under the court's jurisdiction. That position was only partly reflected in the draft statute, inasmuch as article 20 (e) broadened the scope of jurisdiction ratione materiae beyond the limits of what seemed to be currently acceptable, encompassing crimes that could be sufficiently well addressed by applying the principle of aut dedere, aut iudicare.

5. The wording of article 21, which conferred on the court an inherent jurisdiction in respect of the crime of genocide, was sound. On the other hand, it was a retrograde step to propose the "opting in" system for the crimes referred to in articles 20 (b) and 20 (d), since those crimes were so serious that it should be impossible for States to accept the statute without accepting the jurisdiction of the court in such cases. Moreover, genocide and crimes against humanity related to the same acts, and it was very difficult to draw a dividing line between them.

6. With regard to article 23 of the draft statute, while paragraph 1 was acceptable, paragraph 2, which made the exercise of the jurisdiction of the court dependent on a determination by the Security Council that a State had committed an act of aggression, had to be rejected. The political question of whether a country had perpetrated such an act was in principle separate from the legal question of whether an individual from a particular country could be held responsible for the act. It should be noted that it was so exceptional for the Security Council to determine that a State had committed an act of aggression that the court could not easily overlook such a decision in a particular criminal case.

7. The role of the court had been presented as too flexible, and it might be more appropriate to opt for the system of preferential jurisdiction, particularly if its jurisdiction were to be limited to the crimes referred to in articles 20 (a) to 20 (d). In the event of conflicting jurisdictions, the court would then have priority in deciding whether or not to deal with a case. If it decided not to try a case, competence would revert to national judicial bodies.

8. The wording of article 25, paragraph 1, was appropriate inasmuch as it was based on the assumption that every State party to the statute that was also a contracting party to the Convention on the Prevention and Punishment of the Crime of Genocide would automatically accept the jurisdiction of the court. For other crimes, however, the text as it stood established that only the State that had custody of the suspect or the State in the territory of which the crime was committed could lodge a complaint. A broader approach would be preferable, for example allowing complaints to be lodged by States whose nationals had been victims of a crime, which had an interest in lodging a complaint and which were willing to do so. It therefore seemed more appropriate, given the seriousness of the crimes, to opt for a system similar to that proposed in the case of genocide, under which every State party to the statute would be competent to lodge a complaint with the court.

9. The proposals regarding proceedings were, on the whole, acceptable. They should be kept as simple as possible, while satisfying the requirements for a fair trial.

10. Although the draft, as it stood, did not rule out the possibility of trials in absentia, the criteria applied were too narrow and arbitrary. The criterion used in article 44 (h) of the 1993 draft (A/48/10) seemed preferable. Needless to say, once the presence of the accused had been secured, the trial would have to be reopened to allow the accused to take advantage of all the rights guaranteed by universally recognized human rights instruments.

11. The Netherlands wished to question whether the exception to the principle of double jeopardy (non bis in idem) referred to in article 42, paragraph 2 (a), was correct. The application of the principle depended not so much on how a criminal act was characterized as on whether the act itself was the subject of renewed prosecution proceedings.

12. In line with the trend towards abolition that was reflected in several human rights instruments, the death penalty was not to be applied as a sanction.

13. The procedures established in article 44, paragraph 2, did not appear to be sufficient to deal with cases of perjury. It would be preferable to confer competence on the court itself in such cases.

14. Recent developments in the former Yugoslavia and in Rwanda illustrated the need to establish an international criminal court as soon as possible. The International Law Commission's draft provided a good basis for future discussions, and it was to be hoped that sufficient common ground could be established in the Sixth Committee to allow an international conference of plenipotentiaries to be convened for the purpose of studying the draft and concluding a convention on the establishment of such a court.

15. Mr. VILLAGRÁN KRAMER (Guatemala) congratulated Mr. Vereshchetin on his excellent presentation of the Commission's report. He also commended the Commission for its work on the draft statute for the international criminal court, which reflected a determination to produce a useful document on such a complex topic, leaving the road clearer than it had been when the question had first been approached 50 years previously.

16. He was prepared to support any measure adopted by the Sixth Committee to stimulate discussion and arrive at eventual approval of the draft statute, whether through a conference of plenipotentiaries or through the General Assembly. While that seemed to him to be the most appropriate route, he would support the formula that was considered the most rapid and practical. With regard to whether to establish the court by means of a treaty or by means of a General Assembly or Security Council resolution, he felt that the second option bore a double drawback in that it would not allow the court's competence to be as broad as had been proposed in the draft, and that it would deny the court sufficient means of action.

17. With regard to the court's competence, the draft established a useful distinction between crimes under general international law, such as genocide, and crimes under international treaty law, which were those referred to in the provisions listed in the annex to the draft statute. The draft should elaborate the first category of crimes with an eye towards including cases distinct from genocide, such as piracy or torture. In other words, the decisive element would be the nature and scope of the act at the international level, so as to allow general international law to serve as the framework for an entire series of criminal acts. Nevertheless, that should not detract from the importance of the second category of crimes, namely those provided for under international treaty law, which would give the court competence over the majority of acts of terrorism.

18. With regard to the exercise of penal jurisdiction, the only case in which the court's competence needed to be restricted and be subject to a prior decision of the Security Council was that of aggression. When examining that question from a strictly legal point of view, the Commission had been unable to provide any other solution than that proposed in the draft. Although some delegations, for political reasons, had proposed to broaden the list to include war crimes, genocide, etc., the Commission's solution was the one justified from the strictly legal perspective. He was nevertheless prepared to give favourable consideration to such a broadening of the list.

19. Regarding the structure of the court, two levels of jurisdiction were recognized in the draft statute as proposed by the Commission, but the appeal was presented as a system of control of legality - a blend of appeal and annulment - a control that would be exercised over errors of fact and errors of law, and also over procedure and the submission of evidence (error in processando and error judicando). Such broad powers could certainly be granted to an appeals chamber, but in that case more precise rules of evidence than the current ones would have to be included in the statute. In particular, as was known, there were very delicate procedural questions, such as errors of law in the weighing of evidence, that presented real headaches for any jurist, whether judge or counsel. Those provisions of the statute would have to be refined for that reason.

20. With regard to the election of judges, he felt that in a double-hearing system, not only should the trial judges be chosen in their capacity as trial judges, but the appellate judges should also be chosen in their capacity as appellate judges. It should be the States parties to the statute that decided whom to elect, although within the framework of that useful distinction.

21. As for judicial guarantees, the Commission's emphasis on the principle of nullum crimen, nulla poena sine lege was praiseworthy. On the other hand, one had to be careful with the relationship between the principle of non bis in idem and the revision procedure. The draft statute proposed that the court itself could re-examine issues on which it had ruled at first instance. Nevertheless, the right of revision was always conceived of within the framework of new issues that the accused or the accuser made known to the tribunal. In a discussion of the substance of the statute, therefore, it was necessary to distinguish clearly

between the concept of res judicata, the right of revision and the principle of non bis in idem. Unless those subtle juridical distinctions were duly clarified, the statute would be difficult to apply.

22. Finally, with regard to the draft Code of Crimes against the Peace and Security of Mankind, he said that Guatemala had previously argued that it was necessary to preserve a close relationship between the international criminal court and the Code of Crimes. However, given the rapidity with which the draft statute for the court had been prepared, and the manner in which the draft Code was being prepared, it had reconsidered its position. His Government was no longer subordinating its support for the establishment of the court to the prior adoption of the Code. Nevertheless, when it was adopted, it would have to be included in the list of treaties in the annex to the draft statute for an international criminal court.

23. Mr. KIRSCH (Canada) congratulated Mr. Vereshchetin on his detailed presentation of the International Law Commission's report, which reflected appreciable progress in various spheres. He also welcomed the productivity of that body, which had completed its work on the draft statute for an international criminal court with significant improvements over the previous draft.

24. Establishing an international criminal court would expand current international law in a manner consistent with its evolution over the course of the twentieth century. Traditionally, public international law had focused on the rules governing relations between States and between each State and the international community. The desire for a superior body to govern those relations had resulted in the creation of the United Nations, of which the International Court of Justice was a part. International law had been adjusting to the needs of the international community and had more recently begun recognizing certain basic rights of individuals. The draft statute presented by the Commission constituted the logical next step: the creation of an international body able to rule on violations of fundamental rules of international law, recognizing in a concrete way that individuals also had duties in that sphere.

25. It was unfortunate and also ironic that there were so many examples of violations of international law. An international criminal court would serve two crucial purposes in that regard: first, the knowledge that the perpetrators of criminal acts would be prosecuted would serve as a deterrent factor; second, the prosecution of crimes against humanity would respond to the desire for justice on the part of victims of those offences. The international community could thereby contribute to maintaining peace and security by discouraging all reprisals or vengeance. The idea of an international criminal court had begun with the League of Nations and had been maintained in the United Nations for decades; what was new was that States had found the political will to establish a court of that kind, a proposal that Canada had always actively supported.

26. His delegation had studied the draft statute with great interest in light of the comments it had presented on the earlier draft the previous year. He wished to make the following comments on the current version.

27. First, with regard to the establishment of the court, he supported the creation, by a treaty between States, of a permanent international criminal court which would complement national criminal justice systems and would sit as required. Such a court could only function effectively within an appropriate relationship with the United Nations, both for administrative purposes and to enhance its universality, authority and permanence. Canada had some concerns regarding the legal capacity of the court in the territory of each State party. For example, it could not accept direct enforcement of the orders of the court but instead would comply under mutual legal assistance arrangements as defined in international law.

28. Second, with respect to the court's jurisdiction, he believed that certain issues related to the crime of aggression would require further discussion if that crime was to be properly applied by domestic courts. For example, the relationship between the concept of aggression as currently defined in relation to a State and the notion of aggression applied to an individual as envisaged in the draft statute should be clarified. It would be appropriate, in paragraph 3 of the annex on crimes pursuant to treaties, to mention the Protocol to the Montreal Convention, namely, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, of 24 February 1988, which dealt with terrorist attacks in airports.

29. Third, with regard to matters of procedure, since the international criminal court would have available to it limited case-law and precedent in international criminal law, it was surely important, for the sake of consistency and for the purposes of appeal, to allow for dissenting decisions, particularly at the trial level. Then, if the appeals chamber was given the opportunity to review the case fully, looking at it from the perspectives of both the majority and the minority of the judges of the trial Chamber, it would have available to it all the arguments presented in the lower court. A related issue was whether the court would be bound by its own decisions, particularly at the appeal level. For the sake of consistency, it was important that, at the very least, the court should be bound by its appeal decisions.

30. Fourth, the number of issues which remained to be considered suggested that some time would be required for further discussion and reflection before a diplomatic conference could be convened. An effective approach would be to agree that a United Nations conference should be held some time in 1996. In addition, a preparatory committee should be established to allow States to make the changes in the draft statute that they considered necessary.

31. Mr. YAMADA (Japan) said that his Government did not question the need for measures to be taken at the international level to complement the traditional system of criminal justice based on national sovereignty. At the same time, however, in order for an international system to be effective, the consent of States was indispensable. The draft statute for an international criminal court

submitted by the International Law Commission rightly made it clear that the proposed court would be complementary to national criminal justice systems. It stipulated that the court would be established by treaty and not by resolution of a United Nations organ, and it adopted in principle the "opt-in" system concerning the jurisdiction of the court.

32. In part 3 of the draft statute, the crimes enumerated in article 20 still needed to be more clearly defined, and article 23 required further study. In particular, he was concerned that article 23 (3) would, in effect, result in judicial proceedings becoming one of the political measures of the Security Council.

33. The desire to see an international criminal court established as soon as possible was quite understandable. However, in order for it to function properly and to be able to guarantee the rights of suspects and the accused, it was essential to lay down: first the substantive law, by specifying the type of act that constituted a crime and the nature and limits of the penalty imposed for that crime; second, the procedural law, by providing in detail for the procedures of investigation and public trial and establishing the rules of evidence; and, third, the court organization law, by specifying the required qualifications of judges, the procedures for disciplinary action against judges and the like. Since, under the international criminal court system, individuals would be prosecuted by the international community, special attention would have to be paid to the protection of the rights of the accused, for in most cases the accused would be tried by judges from different cultural backgrounds.

34. A number of aspects of the draft required work. With regard to substantive law, unless the constituent elements of crimes and the penalties to be imposed were clearly defined, the application of codified international law as criminal substantive law would contradict the principle of nullum crimen sine lege. The idea of applying national law at the level of international law to compensate for lacunae in substantive criminal law was worth considering, although the manner in which that was effected would require careful study. The wording of article 33 (c), which provided that the court should apply "to the extent applicable, any rule of national law" was too vague.

35. With regard to procedural law, the draft provisions were very general and far from adequate. For example, the draft lacked provisions on requirements for the issuance of a warrant, procedures for its execution, requirements for admissibility of evidence and the time period allowed for appealing the judgement. Moreover, the period of pre-trial detention, which should be the minimum, could be indefinite if approved by the presidency. Given that in many cases the crimes subject to prosecution by the court would be submitted in the context of political turmoil, there was reason to fear that the judicial procedure might be abused for political ends. Therefore, the adoption of safeguards, including the need to impose sanctions, should be considered. He believed that the procedural details must form part of the statute of the court rather than being dealt with in its rules.

36. With regard to court organization law, the draft as it stood lacked provisions for preventing the misconduct of judges and other officials or providing recourse for those affected by such misconduct. Since provisions for impeachment of judges could not be included in the rules of the court, which were to be formulated by the judges themselves, such provisions would have to form part of the treaty.

37. In addition, the statute would have to be compatible with national judicial systems, which were subject to the constitutions of their respective States. In that context, it was inappropriate for the draft to recognize the inherent jurisdiction of the court in cases of genocide. The obligation of the States parties to submit evidence and to extradite criminals and the question of double jeopardy (non bis in idem) would need to be examined carefully in the context of the national legal systems.

38. It would be premature to convene a conference of plenipotentiaries before subjecting the current draft statute to detailed scrutiny at an informal consultation meeting, within the framework of the Sixth Committee, in which specialists in international law and in criminal law representing the legal systems of the world would participate. He suggested that the Committee should recommend a resolution to that effect to the General Assembly.

39. In conclusion, he said that it was essential to coordinate the draft code of crimes against the peace and security of mankind and the draft statute for an international criminal court, because both instruments contained provisions dealing with the same subject-matter. He suggested that the Special Rapporteur for the draft code should participate in the informal consultations on the draft statute.

40. Mr. BIØRN LIAN (Norway), speaking on behalf of the Nordic countries, said that those countries had confirmed their support for the adoption of a code of crimes against the peace and security of mankind but pointed out certain difficulties with respect to questions of principle as well as drafting. The International Law Commission should focus on the most serious crimes against the peace and security of mankind.

41. With reference to the draft statute for an international criminal court, he noted with satisfaction that the Commission had completed its work on the draft statute and supported the recommendation that the General Assembly should convene a diplomatic conference to conclude a convention on the establishment of an international criminal court. The text of article 2 of the Commission's draft failed to make sufficiently clear the relationship between the court and the United Nations. It was, however, a valuable basis for constructive discussions within the framework of a diplomatic conference. The time was ripe for the establishment of a permanent and global criminal court.

42. Mr. ZHANG Kening (China) said that the alarming increase in certain transnational and international criminal offences had given new urgency to the search for new forms of international cooperation in the legal domain. It was therefore conceivable that the establishment of an international criminal court

to supplement the existing system of universal jurisdiction would facilitate the prosecution of persons who had committed international crimes, particularly those offences that seriously endangered the fundamental interests of mankind and the international order. Nevertheless, given the complexity and sensitivity of the questions involved, his country had always considered that acceptance by States of the future international criminal court should be voluntary. Moreover, the proposed court should not replace or override systems of national criminal or universal jurisdiction: the relationship must be a complementary one. It was only on that basis that the court would receive universal acceptance and function effectively.

43. In general, the Commission's new text of the draft statute for an international criminal court was more balanced and realistic than the earlier one and could serve as the basis for negotiation. It was right that the court should be established by means of a treaty, not least because it would avoid the political and legal problems that might be inherent in other alternatives and would promote the universality of the court. On the question of the court's relationship to the United Nations, he supported the solution adopted in the draft statute since it avoided the problem of having to amend the Charter which would arise if the court were to be set up as a judicial body of the United Nations.

44. By clearly defining the subject-matter jurisdiction of the court, the statute had respected the nullum crimen sine lege principle.

45. The provisions concerning the modalities of State acceptance of jurisdiction conformed to the character of the court's jurisdiction and preserved States' freedom of choice to become parties to the statute or to accept the court's jurisdiction.

46. In general, the amendments that had been made to the earlier text were acceptable. He nevertheless had a number of suggestions for further improving it. The statute made jurisdiction subject to prior acceptance by States, except in cases of genocide, which fell under its inherent jurisdiction. In spite of the gravity of that crime, it must be asked whether the court should have compulsory jurisdiction in such cases. On the one hand, becoming a party to the Convention on the Prevention and Punishment of the Crime of Genocide did not automatically mean acceptance of international criminal jurisdiction. On the other hand, the proposed international criminal court would be established by treaty. It was therefore necessary to know how those provisions of the statute were to be reconciled with the provisions of relevant international treaties and with the character of the court. That was a matter that needed to be studied further.

47. Concerning action by the Security Council, there was still disagreement as to whether the premise serving as the basis for article 23 (1) of the statute, concerning the jurisdiction of the court in cases where a matter was referred to it by the Security Council under Chapter VII of the Charter, was a correct interpretation of the Charter. With respect to the creation of a tribunal to try persons who had committed crimes in the former Yugoslavia, some States had

expressed reservations as to whether the Security Council was authorized to set up a compulsory jurisdiction. It was therefore dubious whether it was wise to base the statute on such a controversial assumption. It was also dubious whether that provision was compatible with the character and basis of the court. The statute should provide for the possibility that the Security Council might make use of the court in specific circumstances, but it should do so only in ways that were compatible with the character of the court and the principle of voluntary State acceptance of its competence and that would not compromise its independence as an international judicial body. It would probably be helpful to provide, in cases where the Security Council decided to make use of the court, for prior acceptance by the States concerned of its jurisdiction. It was to be hoped that extensive consultations would produce a generally acceptable solution.

48. The provisions concerning the subject-matter jurisdiction of the court had been improved and the definition of crimes under general international law was now clearer. However, some of the crimes listed in article 20 lacked the precise definition that was required in criminal law. Even in the case of crimes defined by treaties there was no unanimity of views as to whether those definitions met the requirement of precision. If, as had been indicated, the statute would not include definitions such as would be formulated in other instruments, it was clear that the drafting of definitions for use by the court required further study.

49. Article 42 concerning the non bis in idem principle should be clarified and improved. Given the possibility that its provisions might be interpreted as casting the international criminal court in the role of a higher court vis-à-vis the national courts, it needed to be amended to restrict its application to States which had accepted in advance the jurisdiction of the court.

50. The establishment of an international criminal court was undoubtedly a complex major undertaking of the international community in its fight against crime. It would therefore be necessary to ensure mutual assistance and cooperation between national criminal jurisdictions and the current criminal jurisdiction. China was ready to continue the exchange of views with other States in order to achieve a satisfactory outcome.

51. Mr. RODRÍGUEZ CEDEÑO (Venezuela) said that the International Law Commission had made substantial progress during the year by bringing to a conclusion its work on two very important subjects: the law of the non-navigational uses of international watercourses and the draft statute for an international criminal court. On the latter subject, he commented that the international community was fully convinced of the urgency of setting up such a court.

52. The urgency of the matter had been confirmed by the creation of special bodies, such as the International Tribunal for the former Yugoslavia and the recent recommendation that the jurisdiction of that Tribunal should be extended to acts committed in Rwanda (document S/1994/1125). The same degree of urgency should be attached to the code of crimes against the peace and security of

mankind, the provisions of which should be harmonized with those of the statute of the court.

53. Venezuela had always supported the establishment of an international criminal jurisdiction which would respond to the evolution of international relations and to the need to punish crimes against the peace and security of mankind. The Commission had prepared a balanced draft that provided an excellent basis for the analysis and finalization of a text by a preparatory committee to be set up prior to the convening, at the earliest possible date, of the conference of plenipotentiaries which would adopt the draft statute.

54. The court should be a permanent and autonomous body, as befitted a jurisdiction, although it should also be integrated into the United Nations system, as the Permanent Court had been at the time of the League of Nations. The way in which the court would be linked to the United Nations was closely related to the manner in which it was established. The statute was equivalent to the constitutive instrument of an international organization, in conformity with the provisions of article 20, paragraph 3, of the Vienna Convention on the Law of Treaties. Its entry into force should be based on a large number of ratifications, otherwise it would be necessary to amend the Charter of the United Nations, a procedure that might not prove very feasible.

55. With regard to part 2 of the draft statute, and in particular the election of the judges of the court, his delegation believed that a specific clause should be included incorporating the principle of equitable geographical representation, which had been the accepted practice of the United Nations. Another major issue was the financing of the court which, regardless of the manner in which it was established, should possess its own funds. Were the procedure proposed by Venezuela to be adopted, the statute should include a clause relating to the budget.

56. Before addressing a number of substantive issues, he underscored the desirability of establishing a preparatory committee to prepare and submit to the conference of plenipotentiaries provisions relating to the entry into force of the statute, general reservations relating to it, the settlement of disputes over its interpretation or implementation and the rules for its amendment.

57. As for substantive issues, there were two fundamental questions which deserved close attention: the jurisdiction of the Court and the applicable law. First of all, it was necessary to distinguish between the court's existence and acceptance of its jurisdiction, which should in any case be expressed in conformity with the relevant rules laid down in the text. The court's jurisdiction should necessarily be based on the consent of States.

58. The inherent jurisdiction conferred by article 23 in relation to action by the Security Council, under Chapter VII of the Charter, and to cases of genocide, was in keeping with the very nature of the court. However, the current wording of the article did not seem appropriate, as it made it possible for an international body to be subordinate to a political decision adopted by

an organ such as the Security Council, in which the right of veto of some States could impede the initiation of proceedings.

59. Only individuals could be tried by the court, whose jurisdiction was, moreover, exclusive. However, it was possible for the accused to be tried by the custodial State, by another State with which there was an extradition agreement, or by the court. States should have the option of handing accused persons over to the court or trying them in accordance with their own national law. In the case of nationals of the custodial State, he said that, should the situation arise in Venezuela, the most likely outcome would be for the suspect to be brought before the national jurisdiction, in accordance with Venezuelan law.

60. Another issue that required close analysis was that of the applicable substantive law. Treaty law and customary law should be regarded as the main sources of international criminal law. Secondary sources, such as international legal doctrine and jurisprudence, including the new sources of international law such as the resolutions of international organizations, should also be taken into account. However, the reference to national law (article 33 (c)) was inappropriate, as there was no reason for an international court to apply it.

61. Article 20 (e) specified the main sources and referred to an annex listing a number of international instruments which, in one way or another, were related to the crimes referred to in the statute and to applicable law. The court should be in a position to exercise its jurisdiction clearly. The wording of article 20 was clear, although a doubt remained - which should be dispelled as soon as possible - as to whether it was stating a principle or a rigid rule. Allowance should be made for the list of international crimes to be expanded so that the court could adapt to the constant changes taking place in the international arena. Thus, for example, terrorism and other crimes against mankind and against international peace and security, as well as drug trafficking, could come within the court's jurisdiction.

62. With regard to procedure, Venezuela believed that the rules set out in the draft statute should be spelt out more precisely when the time came to adopt the rules of the court.

63. Although the establishment of the court was a legal question, it was not possible to disregard either political factors and considerations or their consequences. The text finally adopted should be acceptable to all countries, in order to avoid the risk of establishing an ineffective institution.

64. Mr. Lamptey (Ghana) took the Chair.

65. Mr. CAFLISCH (Observer for Switzerland), referring to the draft statute for an international criminal court, said that Switzerland, which had always favoured the establishment of an international jurisdiction to prosecute those guilty of particularly serious crimes, could not but view the new version of the draft positively. A court such as that envisaged in the text would help to ensure respect for international humanitarian law, above all the 1949 Geneva

Conventions and the 1977 Additional Protocols thereto, of which Switzerland was the depository.

66. Although Switzerland advocated the establishment of a permanent international criminal jurisdiction, it was not prepared for that to be achieved at any price. Such a jurisdiction, if it was established by a treaty, would offer guarantees of its effectiveness and efficiency, which would not be possible without the support of a large number of States. Failing that, both the instrument and the court would be a dead letter. Accordingly, Switzerland believed that the possible convening of a conference of plenipotentiaries to adopt the convention should be decided on the basis of that requirement.

67. Up to the present time, war crimes had been tried internationally by ad hoc tribunals, and, in recent years, within the framework of Security Council resolutions based on Chapter VII of the Charter. The establishment of a court should make it possible to replace those tribunals by a single judicial organ, thus checking the proliferation of new institutions in that sphere.

68. Subject to those two reservations, Switzerland was prepared to participate in multilateral negotiations leading to the preparation of a convention based on the draft of the International Law Commission.

69. The Swiss delegation would have preferred a more direct statement on the court's jurisdiction, i.e. that its jurisdiction with respect to the crimes listed in article 20, paragraphs (a) and (d), could be exercised without requiring from States parties the explicit acceptance provided for in article 22. However, that would not apply to the crimes prohibited by the treaties referred to in article 20, paragraph (e), and listed in the annex, where both explicit acceptance and the status of State party to the treaty in question seemed to be required.

70. Proceedings would be initiated (articles 21 and 23) on the basis of a complaint brought by a State which had accepted the court's jurisdiction with respect to a specific category of crimes. Such acceptance was not required in the case of genocide, but the complainant State must be a party to the future convention and to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Those rules raised two questions. Firstly, since genocide was punishable both under customary law and under the 1948 Convention, it was not reasonable that the right to bring a complaint should be limited to the States parties to the Convention. Secondly, it must also be asked whether the prosecutor should not have a right of initiating proceedings in such cases.

71. Article 37 contained the general requirement that the accused should be present during the trial. The Swiss Government supported that provision without reservation.

72. The issue of penalties was not satisfactorily resolved in article 47. Firstly, it did not seem logical to offer judges the alternative of imposing a sentence of life imprisonment or imprisonment for a specified number of years on the one hand, and a fine on the other. Nor was it right that crimes of the

seriousness of those dealt with in the draft statute could be punished by a mere fine or that a fine could be imposed but terms of imprisonment of months were excluded. Even more serious was the vagueness of article 47, which made a mockery of the requirement of nulla poena sine lege since it did not specify either the duration of the term of imprisonment or the amount of the fine. The expression "may have regard to" the penalties provided for by national law, which appeared in article 47, paragraph 2, was also extremely vague: on the one hand, it allowed the court not to take such laws into account; on the other hand, it allowed the court to choose from among several national legislations without offering any criteria for making the choice. The best solution, as in the precedent of the International Tribunal for the Former Yugoslavia, was to apply a single national legislation, that of the State in whose territory the crime had been committed. Another omission which must be made good was that the draft text said nothing about restitution of items which had come into the possession of the convicted person illegally.

73. Although according to article 26, paragraph 5, the presidency could request the prosecutor to review his decision not to initiate an investigation or not to file an indictment, it was not clear what would happen if the prosecutor stood by his decision. It seemed preferable to leave the decision entirely to the discretion of the prosecutor or to allow the parties concerned to appeal against it before a body fulfilling the function of an appeals chamber.

74. The non-mandatory language of article 45, paragraph 3, was unacceptable. A case which could not be decided by a trial chamber should not be retried by the same chamber; furthermore, it must be asked whether the failure to agree on a decision did not amount to acquittal. On the other hand, paragraph 5 was correct not to allow any dissenting or separate opinions in the decision, for they might erode the authority of the court. It must be pointed out that in the French text the word "opinion" should be replaced by "décision".

75. With regard to institutional issues, the solution provided in article 6, which divided the judges of the court into two categories, did not seem correct. States parties should have a degree of latitude in the election of judges; moreover, the proposed method complicated the election. With respect to paragraph 3, it seemed better to appoint 11 judges (three for each trial chamber and five for the appeals chamber), the solution adopted for the International Tribunal for the Former Yugoslavia, which also allowed for the financial situation of many States.

76. That same financial situation made it difficult to understand why article 19, paragraph 2, stipulated that the rules of the court should be submitted to a conference of States parties or why any amendments to the rules should be subject to the same procedure if the judges so decided. It seemed better to follow the example of the International Court of Justice and the International Tribunal for the Former Yugoslavia, which had drafted their rules without recourse to States or to the Security Council.

77. There were other questions which Switzerland would like to take up at a later stage in the Committee's work. However, it believed that the Commission's draft text constituted a solid basis for the future negotiations among States.

78. Mr. TANG CHENGYUANG (Asian-African Legal Consultative Committee) said that it was an honour to address the Sixth Committee. Initially the activities of the Asian-African Legal Consultative Committee (AALCC) had been focused on the formulation of legal rules and principles and the provision of advisory services to its member States. Since its acquisition of permanent observer status in the United Nations it had oriented its work programme so as to complement the activities of the United Nations in the progressive development and codification of international law; that had been done on several issues.

79. Following the formalization of links with the Committee, the AALCC secretariat had undertaken the preparation of notes and comments on the items on the agenda of the General Assembly which were designed to help the delegations of States members of the Consultative Committee to take an active part in the Assembly's proceedings. In 1994 the documents prepared by the secretariat dealt with such important issues as the elaboration of an international convention on the security of United Nations and associated personnel.

80. The cooperation between AALCC and the United Nations dated back to 1956 when AALCC, as a service for the Asian-African community, had undertaken a systematic review of the work of the International Law Commission. That review had become a permanent feature of its work programme. It was the normal practice for the Chairman of the Consultative Committee to attend the meetings of the Sixth Committee. At its thirty-third session, held in 1994 in Tokyo, AALCC had been honoured by the presence of the Chairman of the International Law Commission, Mr. Vereshchetin, who had given a lucid and succinct account of the progress of the work of the Commission at its forty-fifth session.

81. The items currently on the Commission's agenda were of particular interest to the States of Africa and Asia. The item on international watercourses was in the AALCC work programme, and at its thirty-third session the Consultative Committee had expressed its concern at the increasing number of instances of misuse of freshwater resources. It was important to create an effective mechanism for the peaceful settlement of disputes and for the promotion of subregional and regional cooperation in the non-navigational uses of international watercourses.

82. The Consultative Committee invited the Chairman of the Sixth Committee to attend its next meeting, which would be held in Qatar, and it reiterated its thanks for having been allowed to take part in the work of the Committee.

The meeting rose at 12.45 p.m.